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No. 88-1806

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

LAND AIR DELIVERY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner violated the National Labor Relations Act by permanently subcontracting all of the bargaining unit work during an economic strike, without notifying or bargaining with the Union.

2. Whether the Union's unfair labor practice charge under Section 8(a)(5) of the Act was barred by the six-month limitations period of Section 10(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14, 18) is reported at 862 F.2d 354. The decision and order of the National Labor Relations Board (Pet. App. 19-25), including the decision of the administrative law judge (Pet. App. 26-137), is reported at 286 N.L.R.B. No. 107.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1988. A petition for rehearing was denied on March 2, 1989 (Pet. App. 15).[1] The petition for a writ of

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[1] On March 29, 1989, the court of appeals amended its December 2, 1988, judgment to grant the Board's cross-application for enforcement (Pet. App. 18).

certiorari was filed on May 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an air freight motor carrier engaged in the pickup and delivery of small packages for overnight carriers (Pet. App. 2). On November 13, 1984, during the term of a collective bargaining agreement (effective from March 1, 1982, to March 31, 1985), Teamsters Local 41 (the Union) began a lawful strike to protest petitioner's failure to comply with certain grievance awards, as well as its refusal to take a deadlocked grievance to the next step of the grievance process (*id.* at 3, 21).[2] At the time of the strike, petitioner employed 13 bargaining unit drivers and utilized the services of additional independent contractor drivers (*id.* at 2, 40, 44-45).

To continue its operations during the strike, petitioner used a combination of employees from other locations, its pre-strike contractors, and eight replacement drivers that it hired during the first month of the strike. Three of the replacement employees were terminated in December 1984, however, and the remaining five were terminated on March 28, 1985. Between February 20 and March 1, 1985, petitioner signed agreements with 12 independent contractor drivers. Five of the contractors had not been contractors before the strike, and all 12 continued to perform work for petitioner after the strike ended. By hiring the

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[2] Some of the grievances involved alleged breaches of the subcontracting clause of the collective bargaining agreement. That clause, which prohibited subcontracting of work performed by bargaining unit employees, had been a major issue in the negotiations that culminated in the March 1, 1982 agreement. Indeed, petitioner had agreed to the subcontracting clause only after a three-day strike by its drivers. Pet. App. 2-3, 34-39.

subcontractors and terminating the replacement employees, petitioner effectively eliminated all of the bargaining unit positions by the end of March. Petitioner did not notify or bargain with the Union concerning its subcontracting decisions. Pet. App. 3, 21-22.

The strike lasted almost five months.[3] On April 9, 1985,[4] the 13 striking employees made an unconditional offer to return to work, but were advised that there was no work for them. None of the strikers was offered reinstatement. Pet. App. 4, 56.

On April 11, the Union filed an unfair labor practice charge, alleging that petitioner had unlawfully denied the former drivers reinstatement for engaging in an unfair labor practice strike (*i.e.*, a strike in response to an employer's unfair labor practice). On May 21, the National Labor Relations Board's Regional Director dismissed the charge, finding that the strike was an economic strike, entitling the employees to reinstatement only when positions became available. The Regional Director did not refer to petitioner's having permanently subcontracted all unit work. Pet. App. 4, 57-58.

The Union thereafter made several requests to petitioner for employment information. On June 3, it asked whether petitioner had hired any new employees since April 1, or whether any work previously performed by bargaining unit drivers had been subcontracted as of the date of the

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[3] The beginning of the strike was marked by violence against replacement workers and company property. Petitioner filed an unfair labor practice charge against the Union, and on February 4, 1985, the Union entered into an informal settlement agreement that contained a non-admission clause and a Notice to Employees and Members that it would not engage in any coercive acts or violence. There was no evidence of any union misconduct after February 4. Pet. App. 3-4, 45-46.

[4] All dates hereafter are in 1985, unless otherwise indicated.

inquiry. Petitioner's attorney, erroneously stating that the inquiry involved matters relating to a case currently pending before the Board, declined to respond to the Union's questions. Pet. App. 4, 58-59.[5] On June 22, the Union went back on strike. On July 16, the Union requested information about the employment status of each unit member, including the effective date of the employee's layoff or termination. Petitioner said that it would reply to that request by August 2, but it failed to do so. Pet. App. 4-5, 62.

On August 16, the Union again requested employment status information and asked whether independent contractors were performing bargaining unit work. Pet. App. 4-5, 62-67. Petitioner's attorney responded by letter, on August 22. He stated that, when it came to "putting a label" on the employment status of the unit members, "your guess is as good as mine." In response to the Union's question whether petitioner had subcontracted bargaining unit work, the letter stated that the company "has continued to conduct its business in the same manner and method as it did following the strike on November 13, 1984 [and that] no new contractors or employees have been added since April 9, 1985." Counsel's letter did not advise the Union that all unit work had been permanently subcontracted out prior to April 9. Pet. App. 5, 67-70.

On October 9, the Union filed a charge, alleging that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), in part by "continu[ing] to allow independent contractors or sub-Independent contractors to continue to perform work of the bargaining unit once there was an unconditional offer to return to work." On February 20, 1986, the Union filed an amended

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[5] In fact, as noted above (p. 3, *supra*), the charge referred to by petitioner's counsel had been dismissed on May 21, and the period for filing an appeal had expired (Pet. App. 4 n.1, 59).

charge, alleging violations of Section 8(a)(1) and (3), and adding an allegation of violation of Section 8(a)(5), 29 U.S.C. 158(a)(5). The amended charge stated that on or about February 1, 1985, petitioner had "subcontracted out bargaining unit work without notice to or bargaining with the Union," and that on or about April 9, 1985, petitioner had "failed and refused to reinstate striking employees who had made an unconditional offer to return to work." Pet. App. 5. A complaint issued, incorporating both charges and alleging violations of Section 8(a)(1), (3), and (5) (C.A. App. 102-108).

2. The Board, affirming the administrative law judge, held that petitioner had violated Section 8(a)(5) and (1) of the Act by permanently subcontracting all unit work without notifying or bargaining with the Union, and had violated Section 8(a)(3) and (1) of the Act by refusing to reinstate nine of its striking employees after their unconditional offer to return to work (Pet. App. 19-25).[6] The Board rejected petitioner's contention that it was entitled to refuse to bargain over its subcontracting decision. It explained that "permanently contracting out the work of unit employees is not equivalent to replacement of one employee by another" (*id.* at 22), an act that is permissible under *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The Board acknowledged that petitioner had the right to hire permanent employee replacements, or "to contract out the work temporarily for the duration of the strike" (Pet. App. 22-23). The Board held, however, that "unilateral permanent contracting out of the work[] is, absent proof that the options set forth above were unavail-

[6] The Board found that four of the 13 strikers were not entitled to reinstatement because of individual acts of misconduct during the strike (Pet. App. 22 n.6).

able to [petitioner], not permissible under the Act" (*id.* at 23).[7]

The Board also rejected petitioner's contention that the Section 8(a)(5) allegations of the complaint were barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[8] Like the ALJ (see Pet. App. 98), the Board found that the Union did not have notice that petitioner had permanently subcontracted unit work until a date within the six-month period preceding the filing of the February 20, 1986 amended charge, which specifically alleged a violation of Section 8(a)(5) (Pet. App. 20 n.3). Alternatively, the Board found that "even if the Union was somehow on notice of the permanent nature of the subcontracting" at the time of the April 9, 1985, refusal to reinstate, the October 8, 1985 charge, although alleging only a violation of Section 8(a)(3) of the Act, "described the conduct complained of in terms sufficient to encompass the complaint allegations that [petitioner] had contracted out the bargaining unit work without prior notice to or bargaining with the Union." Thus, the Board concluded, "[t]he February 1986 amendment to the charge, elaborating on the legal theory, was * * * not an essential predicate for the complaint, as

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[7] The Board distinguished permanent subcontracting from "non-permanent, stopgap, or temporary measures entered into by an employer to continue service during a strike." It explained that an employer is under no duty to bargain over "temporary subcontracting necessitated by a strike where such subcontracting does not transcend reasonable measures necessary to maintain operations in strike circumstances." And it stated that "[t]he appropriate temporary character may exist even if the subcontract period extends beyond the strike, provided the subcontracts when entered are only of such duration as is dictated by the exigencies of the strike, or because of the threat of imminent strike." Pet. App. 23-24 n.8.

[8] Section 10(b) provides that no complaint shall issue based on any unfair labor practice that occurred more than six months prior to the filing of a charge with the Board.

the October 1985 charge sufficiently identified the conduct in question to accord due process and fulfill the function of a charge under the Act's procedural scheme." *Ibid.*

The Board ordered petitioner to reinstate the pickup and delivery service previously performed by bargaining unit employees; to offer reinstatement to and make whole the strikers not found to have forfeited reinstatement; to bargain with the Union about the terms of a new agreement; and to restore the terms and conditions of employment provided by the expired collective bargaining agreement, retroactively to April 1, 1985, and until the reaching of a new agreement or impasse, or until the Union waived further bargaining. Pet. App. 25, 134-137.

3. The court of appeals enforced the Board's order (Pet. App. 1-14, 18). The court recognized that under *Mackay,* "an employer faced with an economic strike is entitled to replace strikers permanently with new employees" (*id.* at 7), but held that this rule does not permit the employer to replace strikers with permanent subcontractors. The court noted that "[a] permanent subcontract diminishes the bargaining unit by the scope of the subcontract" (*ibid.*). Moreover, the court stated, "[c]ontracting out all bargaining unit work, as occurred in this case, completely destroys the bargaining unit" (*ibid.*).[9]

[9] The court added (Pet. App. 7-8):

> Although as a practical matter it may be true that total replacement of strikers by new permanent employees will often result in a decertification of the union, there is a legal difference between the employer unilaterally dissolving the unit by contracting out its work and the employees in the unit themselves decertifying the union. Until decertification, the employer is obliged to bargain with the striking union over all terms and conditions of employment in the bargaining unit, and his obligation would be lessened if a portion of the work of the unit were permanently subcontracted. Bringing on permanent replacements, moreover, does not necessarily lead to the extinction of the bargaining unit.

Here, the court found, petitioner's permanent subcontracting decision was not motivated by business necessity. The court observed that the subcontracting had taken place more than three months after the strike began, that petitioner had successfully operated during those months without adding to its pre-strike contractors, and that there was no evidence that petitioner had been unable to continue its operations without additional subcontracting (*id.* at 10-12). In short, the court concluded, petitioner's "decision to subcontract all of its driving work during the union's ineffective strike hardly looks motivated by business necessity. Rather, it appears that petitioner seized the opportunity it thought legally available to fashion a final solution to the dispute over the use of independent contractors." *Id.* at 11.

Finally, the court agreed with the Board that the complaint was not barred by Section 10(b). The court explained that "although the alleged violation of section 8(a)(5) took place more than six months before the filing of the amended complaint on February 20, 1986, the union did not have notice of the permanent subcontracting of unit work until a date within the six month period preceding February 20" (Pet. App. 13).[10] Alternatively, the court agreed with the Board that the October 8, 1985 charge, describing the conduct alleged in the Section 8(a)(5) portions of the complaint, was sufficient to support all of the complaint allegations, even though the charge had not expressly relied on Section 8(a)(5) (*id.* at 13-14).

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[10] The court observed that although the Union had accused petitioner in August 1986 of unilaterally subcontracting unit work, petitioner's response, which stated that it had "continued to conduct business as it formerly did prior to the strike," could reasonably have been construed by the Union as a denial (Pet. App. 13).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), this Court held that it is not an unfair labor practice for a struck employer, "in an effort to carry on the business," to hire other employees to fill the places of strikers and to make and honor a commitment that the new employees will not be discharged at the end of the strike (*id.* at 345-346). As the Court explained in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), however, not every measure taken by an employer to maintain its operations during a strike is permissible under the Act. Thus, in *Erie Resistor*, the Court held that an employer may not grant superseniority to replacement employees or to employees who abandon a strike, even if the employer believes that such offers are necessary to continue the employer's business. The Court accepted as reasonable the Board's conclusion that superseniority, unlike the permanent replacement permitted in *Mackay*, has such a devastating effect on employees, both during and after a strike, that the employer's business interest in providing superseniority does not "outweigh the damage to concerted activities" (373 U.S. at 232). More generally, the Court explained that where "[t]he ultimate problem is the balancing of the conflicting legitimate interests," the "function of striking that balance * * * is often a difficult and delicate responsibility which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review" (373 U.S. at 236 (citation omitted)).

In the present case, the court of appeals applied those principles and correctly held that the Board had struck a

reasonable balance between the employees' right to strike and the employer's right to continue its operations. The court concluded that, at least absent a business necessity, an employer may not permanently subcontract unit work during a strike without first notifying and bargaining with the employees' union representative about that proposed action.

Petitioner contends (Pet. 14-15) that the Board's decision is "flawed" because, in petitioner's view, "permanent replacement with contractors" is no more "destructive of a bargaining unit than permanent replacement with employees." As the Board has previously explained, however, an employee who permanently replaces a striker "becomes a part of the unit represented by the Union"; "the composition of the unit remains the same"; and "working conditions are not changed." *American Cyanamid Co.*, 235 N.L.R.B. 1316, 1323 (1978), enforced, 592 F.2d 356 (7th Cir. 1979). By contrast, permanent subcontracting "remove[s] [the affected] jobs from the unit," at least until and unless the subcontractors abandon their contractual relationship. *American Cyanamid*, 235 N.L.R.B. at 1323. Permanent subcontracting also unilaterally "change[s] * * * the terms and conditions of employment concerning which an employer must bargain" and effectively "destroy[s] the bargaining unit" (*ibid.*).[11] As the court of appeals added (Pet. App. 7), while "total replacement of strikers by new permanent employees will often result in a decertification of the union," until "decertification, the employer is obliged to bargain with the striking union over all terms and conditions of employment in the bargaining

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[11] In 1975, the Board clarified the Union's certification specifically to exclude independent contractors from the bargaining unit (Pet. App. 30-31). Thus, the independent contractors retained by petitioner in this case had been expressly excluded from the bargaining unit.

unit, and his obligation would be lessened if a portion of the work of the unit were permanently subcontracted." Moreover, the court noted (*id.* at 7-8), "[b]ringing on permanent replacements * * * does not necessarily lead to the extinction of the bargaining unit," because "[a] striking union might be able to gain the allegiance of at least some of the replacement employees who, combined with strikers, could provide the union with continued majority support."[12]

The Ninth Circuit's decision in *Hawaii Meat Co.* v. *NLRB*, 321 F.2d 397 (1963), does not hold to the contrary. As the court below correctly observed, *Hawaii Meat* "was carefully drawn to deal with the exigencies of the particular situation presented, and to exclude from the decision's compass cases like the instant one" (Pet. App. 9). In *Hawaii Meat*, the employer decided prior to the strike to subcontract its hauling operations permanently in the event of a strike, and it notified the union of its plans in advance. The employer's purpose in subcontracting was clearly defensive—to keep its plant operating during the strike (321 F.2d at 399). In the present case, by contrast, the subcontracting took place more than three months after the strike started, and petitioner had successfully operated throughout that period without additional per-

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[12] Petitioner's reliance (Pet. 16, 18-19) on *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), is misplaced. In that case, the Court held that assessing the parties' good or bad faith at the bargaining table on the basis of the economic weapons they used amounted to "the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced" (*id.* at 498). Here, however, the Board did not assess the parties' good or bad faith in bargaining negotiations; rather, it determined that petitioner took action that impermissibly burdened the right to strike. That issue is one that Congress has given the Board authority to resolve.

manent subcontracting. In these circumstances, as the court below concluded, "[t]here is no reason to believe that negotiation with the union over [the] issue [of subcontracting] was any more inappropriate or anomalous in March 1985 than it had been in previous years" (Pet. App. 11).

2. There is no merit to petitioner's contention (Pet. 22-29) that it was denied due process by the Board's rejection of its Section 10(b) defense to the alleged violation of Section 8(a)(5). Contrary to petitioner's assertion (Pet. 28) that a "finding of fraudulent concealment * * * was obviously a critical factor" in the conclusion that the February 1986 charge was timely, neither the Board nor the court of appeals relied on that consideration. See Pet. App. 13, 20 n.3. Rather, the Board found, and the court of appeals agreed, that the Union did not have notice of the subcontracting until a date within the six-month period preceding the filing of the February 1986 charge; thus, the case is governed by the settled rule that the statutory limitations period does not begin to run until the party filing the charge knows or has reason to know that an unfair labor practice has occurred. See *NLRB* v. *International Brotherhood of Electrical Workers*, 827 F.2d 530, 533 (9th Cir. 1987); *Teamsters Local Union No. 42* v. *NLRB*, 825 F.2d 608, 614 (1st Cir. 1987).

In any event, the Board had an alternative basis for rejecting petitioner's Section 10(b) defense: it concluded that the factual allegations of the timely October 1985 charge were sufficient to afford petitioner fair notice of the conduct in question and to satisfy the requirements of Section 10(b) with respect to *all* the allegations of the amended charge (Pet. 20 n.3). Petitioner does not challenge that alternative determination, and the court of appeals correctly upheld the decision on that basis as well (Pet. App. 12-13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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